REMARKS

UPON THE

NECESSITY AND EFFECT

OF A

General Bankrupt Law

INCLUDING CORPORATIONS.

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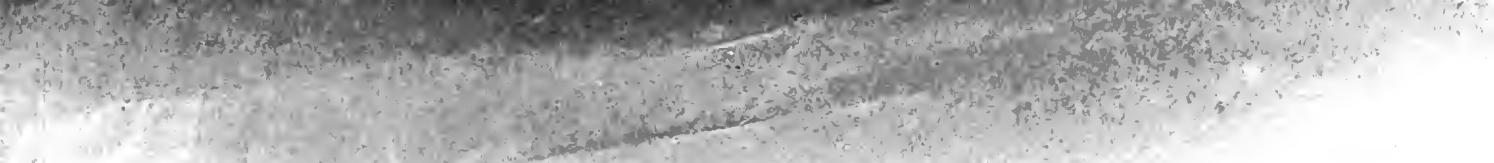

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PREFACE.

TO THE READER.

The movement of the Senator from Georgia, (Senator Toombs,) in the United States Senate, in reference to a general bankrupt law, has created much excitement already in the country, and is likely to produce more as it progresses. There can be no doubt that a large majority, at the present time, is decidedly in favor of action in the premises, and that Congress would be much more profitably engaged in legislating on the subject, than in filibustering about bleeding Kansas and the Lecompton Constitution. The author begs leave to submit some hastily written views upon this subject to the reader, and if his efforts have the effect, to any extent, however small, to call the attention of the country, and the members of Congress, to the great necessity of proper and wise legislation on the subject of bankruptcy, his purpose will be accomplished.

And if the able Senator from Georgia succeeds in bringing up the question, and procuring the passage of a proper law, he will be entitled to the lasting gratitude of the present and future generations.

THE AUTHOR.

New York, March 20, 1858.

A General Bankrupt Law.

REMARKS UPON THE NECESSITY AND EFFECT OF SUCH A LAW, TO INCLUDE CORPORATIONS.

In all civilized countries, where trade, exchange, commerce, and manufactures have been carried on to any extent, some form of bankruptcy has been considered necessary, and has been adopted. In England the law, from time to time, has undergone changes, but has always been retained in some form; and even in this country the different States have found it necessary to adopt for their own citizens some form of an insolvent or bankrupt law, and the wise framers of our constitution reserve therein the expressed right for the general government to enact a general bankrupt law; and twice since the adoption of the constitution, Congress has found it necessary, growing out of an uncommon financial disaster, to pass a temporary relief law, which was called a bankrupt law; but they were so limited in their operation, that they were not only repealed, but prejudiced the country against any law of the kind. The past year the country has been called upon, for some cause of which I shall speak hereafter, to pass through one of those frequently occurring crises in trade, which destroy confidence, annihilate credit, and carry with them more or less, in proportion to their severity, personal and social ruin. Such a state of things again has awoke the thinking classes, not only as to the cause, but as to the remedy.

The causes of these inflations of credit, and subsequent depressions, have been the subject of much discussion, and have been attributed to almost every thing:—bank expansions and contractions, an unsettled state of the currency, extravagance, overtrading, doing business on borrowed capital, railroads, and many other things; but it is evident that no one thing can strictly be named as the cause. Under our system of government, trade and commerce, as it has been. and is, undoubtedly, all these things conspire to produce the result. It is

true, however, that periodically these terrible disasters come upon the country, which rack the foundations of trade, commerce, manufactures, and society, to the very centre, and if there is any way to prevent, or even to ameliorate them, which is practicable, it should be adopted.

It is often true, when a disease or evil is produced by a combination of causes, some one remedy will cure the disease; and equally true that sometimes a remedy, applied in season, will prevent it altogether, or render it so light as to be of little injury.

Undoubtedly among the causes that produced the revulsion we have just passed through, the inflation of paper currency, and the extensive operation of the railroad companies, as borrowers in the money market, have had a marked effect, and perhaps have been prominent and leading causes; while over-trading, which is the natural result of the extravagance of the people, and that, to a certain extent, is nourished by the readiness with which a representation of money can be obtained from banks, when all is "easy," (as the Wall-street brokers have it,) has thrown in its large mite.

Now, what can be done by the country to prevent or mitigate further calamities of this kind? And is there any thing due to those persons who have fallen amid the general crash? These questions are important, and demand a thorough and dispassionate consideration by an intelligent people, and by our legislators, who are but the servants of the people.

That Congress has the power to pass a general bankrupt law, there can be no question. It is not left by the Constitution to inference or construction. It stands out in bold relief, as a positive, expressed power reserved to the Federal Government. After the passage of the law of 1841, (defective as that was,) it being sustained and enforced by all the courts in the United States, the question of the power of Congress, even to include contracts made prior to the law, can scarcely be questioned.

The Constitution provides, that the States shall not make any law impairing the nature and obligations of contracts, but there is no such provision in reference to Congress, and beyond that there is an express provision in the Constitution, which has already been mentioned, that Congress may pass a general bankrupt law, and this gives the absolute constitutional right even to discharge contracts existing before the law was made.

The English government have always acknowledged the doctrine as fundamental, constitutional law—that contracts made, and acts

done, in faith of the then existing law, should not be violated by subsequent legislation to the same extent, that has been held by our courts; and from time to time, without any doubt about the right, Parliament has made and altered bankrupt laws affecting existing contracts. The law of 1841 was passed, approved, and sustained upon the principles above stated; and directly and indirectly almost every court in the United States, including both District and Circuit Judges of the United States Court, and the Judges of the State Courts, sustained the law as constitutional. Very few, if any, among the legal profession will be found at the present time to doubt the constitutionality of such a law, and discussion of the question would seem unnecessary.

The passage of the law cannot be said in truth to be in violation of an acquired right, for all contracts have been made with a full knowledge, on the part of the contracting parties, that Congress has this right reserved in the Constitution, and that the law may be made and enforced at any time.

Will such a law, if passed by Congress, produce the desired effect? Will it prevent such over-issues and inflations of banks? Such over-credits to railroad corporations? Such over-trading, and such heart-sickening panics as we have lately passed through? And what the law should be, to produce such a result, is what we propose to discuss with great brevity.

A bankrupt law, to be permanent, should in this country include all persons and corporations. It is true that in England it has been supposed until of late that a bankrupt law should only affect traders, and until the last half century perhaps this has been true; but England has changed her policy on this subject. This country has always been so constituted, that each portion of her industry has been to a great extent dependent upon the other, and when the agriculturist becomes embarrassed, that embarrasses the retail trader, his embarrassment affects the jobber, the jobber's inability to perform affects the importer the manufacturer, and commerce, and all suffer together, even the common day laborer; therefore bankruptcy, either as remedial or a relief law, should extend to all classes.

In other countries, corporations have never been supposed to be entitled to any privileges or immunities above individuals; but on the other hand, as they are less responsible, and have scarcely any personal obligations, so far as the individuals composing them are concerned, they are not considered as entitled to as much consideration.

In reference to the matter of being compelled to pay their debts when due, or wind up their affairs and have their assets distributed for the benefit of their creditors, they certainly should be held to as rigid a law as individuals, aside from any peculiar reason applicable to banking institutions. The different classes of corporations in the United States, governed as they are by State laws, in different States, furnish strong arguments why a general law of the character of which I am writing should include them.

No one can deny that the difference in exchange between the different States is to a great extent created by the banks; that the country is flooded with bank bills which are not at par where they are sent by the banks issuing them; that a great effort is made by individual banks to get their bills as far from home as possible; and that the more indigent classes are imposed upon by being compelled to receive bank bills at par and selling them at a discount. Neither will any one pretend now to assert that the ups and downs of the circulation of bank bills has not a great influence in creating and controlling the business of the country; that when the banks see fit to refuse discounts, or to lessen the amount of their current discounts, a paralysis in business to some extent follows; that when they consider themselves safe, and for that reason or any other see fit to extend their line of discounts, then the contrary effect is produced. Money is too abundant; property assumes a value it does not actually possess, and every thing goes up and becomes inflated only to have its reaction, and go down as much below the real value as it was above, and with the fall to carry down thousands, who, too credulous, have supposed that the bubble would never break. But it does break, and they break with it.

It is also an established fact that more than once since the formation of our State banking system, the banks have assumed the control of all the business of the country by suspending payments at their own option, and thus completely deranged its business—whether for good or evil, is of little consequence to my argument; for though once, when exercising this power, its exercise may have proved beneficial, it is a power too mighty to be entrusted to the banking institutions of the country, which are merely soulless corporations, who have instituted the bank for their own benefit, having no interest to serve except those of their own stockholders, and frequently regardless even of them; and especially it is true, that this great power for good or evil should not be permitted to remain in the hands of the

banking institutions, for the banks themselves in the different States cannot control their own action at any time, as experience of last year shows. If five or six presidents of banks in Wall street, New York, meet, and in their wisdom or ignorance decide that it is best to suspend specie payments, and do so, every other bank throughout the States must from necessity follow as soon as the telegraph can convey the news to them of the action of the wise men of Wall street; and thus the power is narrowed down to a few bank officers in New York, and they no doubt frequently influenced and controlled by the frauds or unsoundness of their own institutions, and the whole circulating medium of the country is left to the dictation of a few men, with a power more dangerous than the power of the Emperor of Russia, and more liable to be exercised for other purposes than the public good.

A well considered bankrupt law, which shall make the non-payment of the banks an act of bankruptcy, and compel them at once to cease operations, and have their affairs closed up, will effectually prevent any recurrence of a suspension of specie payments. It will do much more than that. It will admonish the banks of the necessity of doing their business in such a safe and prudent way as not to subject themselves to the danger of being compelled to suspend; and will thus give the whole country a circulation of bank bills which will be representative of specie, and not of a dangerous inflated credit, and the bank bills of Georgia or Wisconsin will be as valuable in New York as in the State in which they are issued, except perhaps the time taken for transportation. The great loss now resulting from exchanges will cease, and finally panic and ruin will no longer periodically come upon the whole country by over issues and final suspension of irresponsible or fraudulent banks. Many other substantial reasons might be urged why banks should be included in the law, for they are truly "as plenty as black berries;" but enough has been said in the judgment of the writer to satisfy any person who has no personal interest to serve.

The effect of such a law upon railroads, manufacturing, mining and other corporations, although perhaps not of as much interest to the whole country, will be very important. Railroad corporations which are, and for a long time have been, entirely unable to pay their debts by means of large loans, unearned dividends, &c., have kept up a certain amount of credit in the market, and their stock, worthless as it actually is, is frequently sold for the purpose of investment to widows and orphans, and the little income thus pretended to be per-

manently secured to them is sunk and lost, leaving them without the means of support.

Railroad corporations have done their share towards producing our late commercial revulsions. They have dragooned the public into building parallel lines, and have been the largest borrowers in the market, at any rate of interest at which they could obtain the money, even when the officials knew that the only mode of payment was new loans, or money earned, which no reasonable man could expect would be earned by the road. Undoubtedly many roads have been built upon credit, because the building of roads is more profitable than running them.

These roads have cost some hundreds of millions of dollars, and are to-day worth much less than they cost; they have now a large floating debt which they cannot pay, and it may be deemed expedient for Congress, should they consider this subject, to give them some time to arrange this floating debt before the law acts upon them. Yet every reason exists why railroads, if actually insolvent, should at once pass into solvent hands and render dealing with them more safe, and take away their ability to defraud the community by their stocks.

If it was only the bulls and bears in Wall street that suffered by them it might not be a subject of much consequence to the public; but such is not the case. The great Wall street movement is to catch innocent outsiders, who do not know the ropes, and many who are thus deluded lose all they have.

As it respects mining corporations, a large portion of them, as experience shows, are insolvent, if not fraudulent, from the commencement, and a proper bankrupt law would weed out such irresponsible concerns, and leave only those that are actually sound and healthy. This class of corporations have also been the cause of much loss and suffering, and a future like the past, in that respect, can only be prevented by a healthy bankrupt law.

As it respects other corporations, perhaps it is unnecessary to say more, than that as a body they should not be entitled to privileges above individuals. There are undoubtedly large numbers, and even classes of them that the community need protection against, and it is sufficient that all such as are fit to exist will continue and thrive under the operation of the law, and those that are insolvent and fraudulent will disappear.

The law to be such, as will prove permanent, should not be a mere relief law, like that of 1841, as has already been suggested, but it,

should be substantially an involuntary law, not alone to aid parties who have failed, but to a certain extent, and as far as law can do it, to prevent such unwise and improvident conduct in business, as to make failures and loss to both debtor and creditor necessary. The acts which shall be deemed acts of bankruptcy, should be clearly pointed out in the law, and when committed by the debtor he should at once, at the option of his creditors, or either of them, be compelled to surrender all his effects to his creditors, and an equal distrbiution without preference should take place. It may be urged against this view, that in many cases, were this not the law, parties who were involved, would struggl along and perhaps be able to meet their liabilties and save themselves and their creditors. This may, in a few cases, which are an exception to the general, rule be true. By some accident, or some extraordinary effort, now and then, a party or corporation who are actually insolvent, may succeed in paying their liabilities and becoming finally established in business. The ordinary result of permitting an insolvent to go on with business, is to increase the embarrassment of both himself and his creditors—to create new debts that he can never pay, and frequently to involve his personal friends who lend aid to help a hopeless project, and both bankrupt and creditor are in a worse condition, when he is finally compelled to yield, than they would have been had he been compelled to stop when he first became actually insolvent. Again, in many cases the struggles of the insolvent to recreate a solvent position leads to obtaining goods by false and fraudulent pretenses, and to the sacrifice of his nearest friends. It is only in one case in a thousand that his actual assets, in the end, approach as near as his actual liabilities when he goes on struggling for success, after actual insolvency exists, as when he closes up his business in the outset.

A bankrupt law should always have two great and principal objects in view: the faithful distribution of the property of the debtor equally among his creditors, and the discharge of every honest debtor from his debts, which he can never pay.

Although a bankrupt law should not perhaps be made merely for the temporary purpose of relieving parties who have suffered by the late financial pressure, yet no law on the subject would be complete without a voluntary clause, which should, under proper restrictions, give every person the power to put himself into bankruptcy, and receive his discharge, if he complies with the law.

It has been urged, that no party should have the power to avail

himself of a bankrupt or insolvent law by his own mere motion, because it tends to fraudulent bankruptcies. Now it is always true, and has so been found by experience in England, that when the law is entirely involuntary, the debtor, who wishes to become bankrupt, can readily, even though it be necessary to resort to fraud, procure some creditor to compel his bankruptcy, and then he is in the same position that he would be were the law voluntary.

The present state of things in the United States furnishes a practical argument, not only for an involuntary, but for a voluntary bankrupt act. In this country, the people who are born rich are not the class who produce, manufacture, or trade. Our trade, commerce, and manufactures, as a general rule, are carried on by the industry of the middling classes of society, who have been the artificers of their own fortunes; starting as clerks, and many in a lower capacity, by energy and attention to business, have raised themselves to the position they occupy.

At the present time, thousands upon thousands of this class have been swept down by the general commercial crash, and now have upon them a heavy load of debt, which they can never pay. They are most of them young, energetic and active men, with families to sustain, and children to educate. Keeping them under this load of debt will, in some cases, drive them to despondency and ruin; in others, compel them to linger along, without the aid in business that their friends could give them, were they relieved, and thus the country will lose thousands of active men, whose business qualifications would make them valuable members of society, while, at the same time, holding them still liable, will be of no earthly avail to their creditors, as they never can, and never will pay.

The writer well remembers the complaints made by creditors, under the law of 1841, that they lost so much under the bankrupt law. This was a mistake. They did not lose by the law; they only found out what they had lost before, and were saved the useless trouble of trying to collect it, while the debtor was saved the expense and annoyance of fruitless suits, which otherwise would have been commenced to compel the payment of the debt.

By some it is said that the habit of men in business is to release all debtors who surrender all they have, and that this voluntary act is better than bankruptcy. The difficulty with this proposition is, that it is not true to the extent which is claimed. In nearly all cases,

there will be found four or five or more creditors, who will not release the debtor under any circumstances, and he is compelled to pay these in full; and to do that, he must cheat those creditors who are liberal with him, or obtain the means from his friends and leave it still a debt upon him.

At the present time, the question of a general law, such as has been discussed above, is before Congress, and will undoubtedly be opposed by such banks and other corporations as are interested in its defeat. But, notwithstanding the opposition, from what I can learn, it seems a trial is to be made, and if Congress will dispose of Kansas, and legislate a little for the necessities of the country and its constituents, and give us, for a few years, the trial of such a law, it will, for once at least, be entitled to the gratitude of the nation.

APPENDIX.

The following is a copy of a letter received by Senator Toombs, signed by the representatives of some fifty thousand persons interested in the measure, which the Senator has kindly permitted the author to copy:

To Senator Toombs, of Georgia:

Dear Sir: Having introduced a resolution into the Senate of the United States in reference to that portion of the President's annual message which refers to a general bankrupt law, and having, as we learn from the public prints, to some extent taken charge of that measure in the Senate, we of the Northern and Middle States, who are interested in this matter, take the liberty to address you, sir, and to suggest some notions which have impressed us in relation to this topic. It is undoubtedly true, sir, that all governments which have any commercial transactions must be regulated by some general bankrupt law; and, without such, that their commercial business must constantly be disturbed. This necessity has been admitted in all the leading countries of Europe, as well as by the framers of the Constitution of the United States, when they especially provided that Congress should have authority to pass a general bankrupt law for all the

States. This express right in the Constitution, Congress has never attempted to enforce, except upon two occasions; and in each case the law framed was the offspring of a present panic—but little considered, hastily prepared, and made rather for momentary relief than as a permanent law for the benefit of the whole community, as was intended by the framers of the Constitution. These laws, so imperfectly and hastily prepared, met with much opposition, were inferior in their character, and they were soon repealed. They answered, indeed, for the time, the purpose intended—to relieve that class of men who had become bankrupt by the fortunes of trade; but they did not answer the general purpose intended by the framers of the Constitution, or the necessity of the case.

We do not suppose that we can instruct one so learned and so familiar with this subject as yourself; but you will undoubtedly, from your known character, receive any suggestions from us, however humble they may be, in reference to this subject, in the spirit in which they are submitted.

We think that a bankrupt law, to carry out the intentions of the Constitution, should be permanent, and so carefully drawn as to make its operation effectual, certain, speedy, inexpensive, and sure to produce the desired result.

In the first place, in our judgment, the law should be substantially an involuntary law. Its main object should be the protection of credit, compelling of the payment of just debts in cases of bankruptcy, the working of an equal division of the property among all the creditors of the bankrupt without preference, and the prevention of fraud—and thereby the prevention of extravagance and overtrading. It should also include corporations, especially banks; and we believe that banks—having more to do with the circulating medium of the country, more to do with the commercial interests of the country, more to do with the success of trade in the country, than individuals—should be more especially subject to the care and operations of such a law. Upon this subject some doubt will unquestionably be expressed, and perhaps opposition raised by interested parties to the measure proposed. But the great principle of exempting banks and banking institutions, chartered by the States, from the provisions and vigilance of a general law, is dangerous to the community and dangerous to trade. Their operations must be reached and governed by some substantial and general law of the United States, which shall protect the citizens of every State against the wild banking opera-

tions of their neighbors. We may have no objection to banks chartered by the States; perhaps none to the issue and use of paper money. It is convenient and perhaps beneficial; but we do object to paper money being the representative of credit, and not the representative of actual specie. The United States have the express right, by the Constitution, to compel banks to pay their debts or become bankrupt; and we believe that such a course—the execution of a law embracing such principles—will result in making paper currency the representative of specie rather than the representative of an inflated credit. The United States may have no authority, (and if they have it, it might be unwise at the present day to exercise it,) to interfere with the charters of State banks, or to interfere in any way with the right of the States to make such laws and regulations as they may please in reference to their banking institutions, except so far as the great principle of payment or bankruptcy is concerned. That was intended by the Constitution to be governed by Congress. It should be so, and when it is, we respectfully submit that we shall have comparatively li tle more wild overtrading and extravagant inflation resulting in panics, commercial ruin, and distress, such as we have had for the last year.

Secondly. The law should contain an involuntary clause. At the present time we are living under the shadow of a great commercial revolution, caused, in our judgment, principally by the want of just such a law as you recommend. The result of this revolution has been to involve a large portion of the trading and mercantile community in absolute ruin. Among them are thousands of honest, industrious, intelligent, and energetic men, whose lives have been devoted to trade—some of whom started with a competency, and others making their way up from clerkships and subordinate positions by their own industry—who are now left with heavy commercial debts upon them, which they are unable to pay, and which will continue to oppress them and prevent their future usefulness, unless some relief shall be afforded. And we respectfully submit, that it is much better for the country that these men, many of them young, should be set at liberty, to again become active members of society and of the trading community, than that they should be suffered to sink down, helpless and despondent, with their families, under a heavy load of debt which is destructive to them and never will be of any use to their creditors. They, like all other bankrupts, should be discharged from their liabilities by the operation of law, if they have been honest and have

freely surrendered all their goods to be equally divided among their creditors.

Thirdly. This law, sir, in our judgment, should guard with care against all preferences, and with greater care against all fraudulent transactions upon the part of the bankrupt; and fraud should be rendered, in its operation, as nearly impossible as law can make it. In its details it should be drawn with that care that will render it certain in its operation—not retaining the assets of the debtor in the hands of the court or the assignees, instead of putting them into the pockets of the creditors, for such a length of time as to render final payment of little consequence; and not subjecting the debtor himself to a long, tedious, and harrassing process, by which what means he may be able to obtain shall be used up, and his final discharge rendered of no substantial advantage to him.

These views, sir, we beg leave to submit. They are general in their nature, but we fully believe that they are the views of a large majority, both of the solvent and insolvent portion of the community. We further believe that, if they are substantially embodied in a law which shall be passed by the present Congress, they will—

1st—Afford relief to a large class of suffering and honest debtors.

2d—They will cause an equal and just distribution of the property of debtors, who have failed during the late panic.

3d—By including banks in the operation of such a law, overissues and extravagant speculations will be restrained, and a firm, uniform system of currency throughout the United States indirectly established —which will render overtrading and careless and dangerous speculations less frequent, and panics such as we have lately passed through impossible.

Finally, when this law comes to be executed in future, instead of having, as we now have, as many insolvent or bankrupt laws as there are States—different in their principles, different in their action, and ineffective as between citizens of the different States—we shall have what was intended by the framers of the Constitution, a perfect law for the whole United States, for the protection of the creditor or debtor, and for the protection of the currency of the United States.

All of which is respectfully submitted.